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IN THE

Supreme Court of the United States

STATE OF MICHIGAN, *et al*,
Petitioners,
v.
U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioners hereby incorporate by reference the corporate disclosure statement filed with the petition for a writ of certiorari on November 9, 2000.

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

The D.C. Circuit ruled that lands taken into trust pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 *et seq.* (IRA), located outside the boundaries of formal reservations – those established by treaty, Executive Order, or Act of Congress – constitute reservation lands for purposes of the Clean Air Act (CAA or the Act). This ruling raises important issues that go to the heart of state-tribal relations. The decision below permits tribes to redesignate such lands to the more stringent "Class I" air quality status. This action affords tribes unilateral and extraterritorial authority to constrain or even stop growth and development by non-Indians on lands under state land use jurisdiction.

The IRA was enacted both to reverse the alienation of Indian lands that had resulted from the General Allotment Act of 1887, as well as to establish a mechanism for recovery of lands for tribes. On the face of the IRA, the only consequence of taking land into trust is to exempt such land from state and local taxation. IRA § 5. Courts have generally held, however, that a very significant additional consequence flows from lands being taken into trust under the IRA – *i.e.*, the loss of state and local regulatory jurisdiction over such lands.

The IRA itself would appear to provide no decisional criteria to govern the Secretary's exercise of discretion in taking lands into trust, other than, perhaps, that the land be taken for the beneficial use of the tribe or individual Indian. *See U.S. v. Roberts*, 185 F.3d 1125, 1137 (10th Cir. 1999). The Secretary's view of her discretion to take lands into trust is bounded only by the self-imposed requirement that she consider a series of factors identified in the Bureau of Indian

Affairs regulations set forth at 25 C.F.R. Part 151.[1] None of these listed factors involves the CAA regulatory consequences that may flow from the Secretary's decision to take land into trust. Judicial review is thus limited to a procedural inquiry into whether various factors, all irrelevant to the CAA, were "considered" by the Secretary. *See McAlpine v. U.S.*, 112 F.3d 1429, 1434 (10th Cir. 1997).

The D.C. Circuit's decision adds a new and very troubling dimension to the Secretary's authority under the IRA to take lands into trust. The court found that, because Congress did not specifically define the term "reservation" in the CAA, EPA had the discretion, under the second prong of *Chevron*, to interpret the Act as giving tribes authority to redesignate IRA trust lands located outside the boundaries of formal reservations.

Under EPA's interpretation of the CAA, the creation of IRA trust lands by the Secretary now has an additional ramification: the expansion of the extraterritorial authority that tribes possess under the CAA over the activities of non-Indians on non-Indian lands. This is a consequence certainly not envisioned by Congress when it enacted the IRA in 1934, and one which the Secretary need not even consider prior to taking lands into trust. Moreover, given that the CAA commits tribal redesignation decisions solely to the discretion of the tribe,[2] the EPA interpretation upheld by the

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[1] *But see Whitman v. American Trucking Ass'n*, No. 99-1257, slip op. at 12 (U.S. Feb. 27, 2001) ("We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute.").

[2] While CAA § 164(b) establishes procedures that states and tribes must following in proposing redesignations to Class I, it contains no substantive decisional criteria governing EPA's approval of such redesignations. To the contrary, EPA is authorized to disapprove such a redesignation "only if [the Agency] finds . . . such redesignation does not meet the procedural requirements" of CAA § 164. *See* CAA § 164(b)(2).

D.C. Circuit gives the Secretary the discretion to create tribal power under the CAA without there being any guidance governing the exercise of that discretion under either the IRA *or* the CAA, or, for that matter, any supervision by EPA of the Secretary's exercise of that discretion.

Petitioners are unaware of any federal regulatory statute that has ever been interpreted by the agency assigned by Congress to administer that statute as *implicitly* delegating to *another* federal agency the authority to create regulatory powers in a non-federal instrumentality (such as an Indian tribe) without any explicit guidance from Congress governing that delegation, or without any oversight by the agency administering the statute. Petitioners are unaware, until the D.C. Circuit's decision, of any court being asked to sustain, much less sustaining, such a remarkable interpretation of a federal regulatory statute.

EPA does not dispute Petitioners' characterization of the implications of the decision below. EPA does not suggest that Petitioners have overstated the importance of the decision, or contend that Petitioners' concerns are not immediate and concrete.[3] Rather, EPA rests its argument that Court review is "not warranted" *solely* on the grounds that the D.C. Circuit was correct on the merits. EPA Opp. at 8. As explained below, EPA is wrong.

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[3] The brief in opposition by the respondent tribes suggests that Petitioners have "attempt[ed] to elevate the importance of this relatively routine administrative rulemaking to the level of a crisis by misconstruing EPA's action as a dramatic departure from existing precedent and a significant threat to states." Tribes Opp. at 11. The Brief of Amici States in Support of Petitioners, which warns that the D.C. Circuit decision allows tribes to "threaten use of their Class I redesignation authority to override state and local government industrial land use planning decisions, to restrict operation of existing facilities, to even block new industrial and residential development, and to otherwise impact a State's natural resource policies," States Brief at 4, rebuts the tribes' attempt to minimize the decision's importance.

I. Congress Did Not Intend for EPA to Have the Discretion to Construe the CAA to Give the Secretary of Interior Authority to Expand the Lands That Tribes May Redesignate.

When Congress amended the CAA in 1977 to establish an area classification/redesignation scheme, it for the first time explicitly delegated to tribes certain limited, but extraordinary, authority to engage in air quality regulation that could impose land use constraints both inside and outside tribes' formal reservations. What EPA has overlooked is that Congress also delegated similar extraordinary federal authority to the states.

Specifically, Congress in 1977 designated as Class II the entire geographic area of the country (with the exception of certain national parks, which were permanently designated as Class I). *See* CAA § 162. At the same time, Congress created a new federal power: the authority to *re*designate those Class II areas as either the more stringent Class I or the less stringent Class III. *See* CAA § 164.

In the 1977 Amendments, states were given the exclusive power to redesignate *all* of the land area within their geographic borders, *with the sole exception* of "[l]ands within the exterior boundaries of reservations of federally recognized Indian tribes." Congress delegated the authority to redesignate "reservation" lands exclusively to the tribes. *See* CAA §§ 164(a), 164(c).

For this reason, EPA's assertions that "trust lands are Indian country," and that "federal law generally prohibits States from exercising regulatory authority in Indian country unless Congress has specifically authorized such action," EPA Opp. at 11, are beside the point. Congress *has* "specifically authorized" states to redesignate those lands in "Indian country" that are not "reservation" lands. That is, with the exception of those specific portions of Indian

country that constitute "lands within the exterior boundaries of reservations," states were given *exclusive* authority by Congress in the 1977 CAA Amendments to redesignate all lands within their geographic borders.

Accordingly, EPA is wrong when its asserts that Petitioners' argument "rests on the incorrect premise that States have general authority over Indian lands." EPA Opp. at 12 n.5. Petitioners do not assert that the states' power to redesignate is an attribute of their inherent sovereignty. Rather, Petitioners' position rests on the fact that the states were delegated by Congress exclusive *federal* authority to redesignate all areas of Indian country within the states' borders *except* for those lands that constitute "reservation" lands within the meaning of CAA § 164(c). While Congress could have delegated to tribes redesignation authority over the entirety of Indian country, it did not do so.

Thus, this case does not turn on general principles of federal Indian law, but on statutory construction. As a result, Congress's intent when it first used the term "reservation" in the 1977 CAA Amendments is of paramount importance.

EPA endorses the D.C. Circuit's finding that, because Congress provided no statutory definition of "reservation" in the CAA, the term is "ambiguous." It should therefore be presumed, says EPA, that "Congress chose to entrust" the Agency with the "task" of defining the term for CAA purposes. EPA Opp. at 10.

As this Court has observed, however, "[a]mbiguity is a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). "Words that can have more than one meaning are given content" by "their surroundings." *American Trucking Ass'n*, slip op. at 5, *citing FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-133 (2000). Thus, statutory construction is properly undertaken as a "holistic endeavor," in which a "provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme."

United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371 (1988).

Had the D.C. Circuit applied these principles, it would have recognized that, in the case of the CAA, the demarcation of "reservation" lands is precisely what determines the extent to which tribes, through redesignation, are permitted to constrain the activities of non-Indians on non-Indian lands. *See* Cert. Pet. at 14-16. Having failed to apply these principles, however, the court wrongly assumed that, because Congress included no statutory definition of "reservation," it intended to leave the resolution of this issue, with its attendant implications for the balance of state and tribal jurisdiction, to the discretion of EPA. *Cf. American Trucking Ass'n*, slip op. at 8, *citing Christensen v. Harris County*, 529 U.S. 576, 589-90 n. (2000) (Scalia, J., concurring in part and concurring in judgment) ("The implausibility of Congress's leaving a highly significant issue unaddressed (and thus 'delegating' its resolution to the administering agency) is assuredly one of the factors to be considered in determining whether there is ambiguity").

The redesignation provisions in CAA § 164 were enacted against a backdrop in which Congress codified, with certain limited exceptions, the "prevention of significant deterioration" (PSD) program that EPA had adopted in 1974. *See* § 168(b). In those PSD rules, EPA defined the term "reservation" to mean a formal reservation. *See* Cert. Pet. at 6-7. In this context, Congress did not have to define "reservation" in the statute in 1977; the term had already been defined by EPA in 1974. Congress chose not to change that definition, although it did change the definition of other terms. *Compare, e.g.*, 40 C.F.R. § 52.01(f) (1974) *with* CAA § 169(3) (definition of "best available control technology").

EPA argues that there is "no reason to assume" that "Congress by its silence intended to adopt the narrower definition" of "reservation" from the Agency's PSD program, rather than the "broader" definitions found in other federal

statutes. EPA Opp. at 10. However, it is this very "silence" in 1977 (and again in 1990) that indicates Congress's intended preservation of the definition of "reservation" previously employed by EPA, a definition that reflected the conventional and historic understanding of the formal methods by which a "reservation" is created, and the definition in reference to which Congress codified EPA's 1974 PSD rules in 1977. Only if Congress wished to *depart* from that definition to include off-reservation IRA trust lands would a different statutory definition have been necessary.

In sum, EPA and the D.C. Circuit would have this Court believe that Congress in 1977 intended to impart to EPA the discretion, when it promulgated the Tribal Authority Rule (TAR) in 1998, to interpret the term "reservation" as used in CAA § 164 in a manner contrary to how EPA had defined the term in its PSD rules both before and after enactment of the 1977 CAA Amendments. EPA and the D.C. Circuit would also have this Court believe that Congress in 1977 gave EPA the further discretion, when it would later promulgate the TAR, to redefine "reservation" based on the Agency's reading of judicial decisions rendered *after* 1977, and to include in this new definition not only those off-reservation lands which the Secretary of Interior had taken into trust pursuant to IRA § 5, but also all such lands which the Secretary might take into trust in the future. And EPA and the D.C. Circuit would have this Court believe that Congress intended this result without its having provided any guidance in either the CAA or the IRA, or without its requiring EPA to exercise any substantive supervision.

As a fallback position, EPA also argues that, if Congress did not in 1977 delegate to tribes the authority to redesignate lands beyond "reservation" lands, Congress did extend to tribes this further authority in 1990. Because "trust lands ordinarily are subject to tribal jurisdiction under general principles of federal Indian law," EPA claims that they constitute "other areas within the tribe's jurisdiction"

under CAA § 301(d)(2)(B). EPA Opp. at 12. Thus, "eligible Tribes would have authority" to redesignate trust lands "even if petitioners were correct that trust lands are not properly considered 'reservation[s].'" *Id.*

EPA's assertion is refuted by the plain language of CAA § 164(a). Under that provision of the Act, a state's redesignation authority applies to all lands within that state other than reservation lands. EPA's (and the D.C. Circuit's) interpretation of CAA § 301(d)(2) would mean that states and tribes would both have jurisdiction to redesignate the same non-reservation lands. However, states and tribes cannot have concurrent authority to redesignate these same lands – *e.g.*, one reclassifying them Class I, the other reclassifying them Class III.

Thus, had Congress intended to permit tribes to redesignate lands other than "reservation" lands when it enacted CAA § 301(d), it would have also had to have revised CAA § 164(a) to remove from states their exclusive authority to redesignate such lands. Congress did not so revise CAA § 164(a) in 1990 to restrict state redesignation authority over non-reservation lands within the state.

Finally, EPA errs when its suggests that Petitioners' concerns should be assuaged by the process established by CAA § 164(e), under which EPA will "resolve disputes between Tribes and States over proposed redesignations." *See* EPA Opp. at 11 n.3. While EPA is permitted under CAA § 164(e) to negotiate disputes between states and tribes over redesignation requests, the Agency is authorized to disapprove a tribal redesignation request only when certain procedural requirements have not been met. *See* note 2. Where those procedural requirements have been fulfilled, a tribe possesses the absolute discretion to redesignate any lands located within the exterior boundaries of its reservation.

II. Under the CAA, States May Not Be Divested of Any Regulatory Authority They May Have Over Non-Indian Fee Lands.

In light of the significant implications of Congress's "expressly delegating" to tribes regulatory authority over non-Indian fee lands located within a reservation, there are compelling reasons for this Court to review the D.C. Circuit's determination that the "treatment as states" provisions of the 1990 CAA Amendments constitute such a rare delegation. While relying on the D.C. Circuit's decision, EPA's arguments are similarly inadequate..

First, in support of the D.C. Circuit's delegation holding, EPA reiterates the panel majority's conclusion that the distinction that CAA § 301(d)(2)(B) draws between areas "within the exterior boundaries of the reservation" and "other areas within the tribe's jurisdiction" carries with it "the implication that Congress considered the areas within the exterior boundaries of a tribe's reservation to be *per se* within the tribe's jurisdiction." EPA Opp. at 15. Even if an express delegation could ever be founded on so abstruse an "implication," as Judge Ginsburg correctly observed in his partial dissent, "when one reads the relevant sentence as a whole – rather than focusing solely upon the last phrase – one sees that, rather than expressing a delegation of authority over fee lands and rights-of-ways within a reservation," the sentence "by its terms merely lays down a precondition to the Administrator's treating a tribe as a state." App. 44a. EPA is wrong when it asserts that Petitioners' "contrary reading" would "render this careful formulation superfluous." EPA Opp. at 16.

Second, EPA rejects Petitioners' contention that CAA § 116 precludes the "treatment as states" provisions being construed as constituting an express delegation of authority to tribes, arguing that CAA § 116 "does not grant States authority to regulate air pollution activity in Indian country,

which includes fee lands within reservation boundaries." EPA Opp. at 17. EPA has misconstrued Petitioners' position.

Petitioners do not assert that CAA § 116 *gives* states authority over lands within Indian country, or that EPA lacks authority under the Act to approve tribal regulatory programs for non-Indian fee lands over which a tribe can demonstrate *inherent* authority under the so-called *Montana* "second exception." If a particular tribe is found to have inherent authority over non-Indian fee lands, there is, in effect, no state authority over those lands which CAA §116 serves to retain. At the same time, in those situations where a state possesses authority under its own laws to regulate air quality on non-Indian fee lands – authority which is "preserved" by CAA § 116, as EPA itself concedes (*see* EPA Opp. at 17 n.10) – no *federal* authority over such lands exists under the CAA that can then be delegated to the tribe.

Finally, EPA misconstrues the significance of *Bugenig v. Hoopa Valley Tribe*, 229 F.3d 1210 (9th Cir. 2000), in which the Ninth Circuit adopted the reasoning of Judge Ginsburg's dissent as a "clear statement rule" for determining delegation questions. *Bugenig* illustrates that the approach taken by the D.C. Circuit's panel majority is, to say the least, subject to serious doubt. Moreover, since Judge Ginsburg had himself misapplied the very test which the Ninth Circuit was now adopting, review by this Court is necessary in order to forestall the injection of more confusion into a field of jurisprudence – federal Indian law – that remains in desperate need of clarity.

CONCLUSION

Petitioners respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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